

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
MAR JEAR RESTAURANT, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1979	:	
through April 15, 1981.	:	

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DETERMINATION

In the Matter of the Petition	:
of	:
HERBERT TAYLOR	:
for Revision of a Determination or for Refund	:
of Sales and Use Taxes under Articles 28 and 29	:
of the Tax Law for the Period September 1, 1979	:
through April 15, 1981.	:

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Petitioners, Mar Jear Restaurant, Inc., c/o Herbert Taylor, Officer and Herbert Taylor, Officer of Mar Jear Restaurant, Inc., 12 East 86th Street, New York, New York 10028, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1979 through April 15, 1981 (File Nos. 800770) and 800771).

A consolidated hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 27, 1989 at 9:15 A.M. and was continued to conclusion on December 8, 1989. Petitioners appeared by Herbert Taylor. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

## ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Mar Jear Restaurant, Inc. for the period at issue.

II. Whether Herbert Taylor was a person required to collect sales and use taxes on behalf of Mar Jear Restaurant, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue herein.

## FINDINGS OF FACT

Pursuant to a field audit of petitioner Mar Jear Restaurant, Inc. ("Mar Jear"), which commenced in September 1982, the Division of Taxation, on October 4, 1983, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Mar Jear in the amount of \$121,354.76, plus penalty and interest, for a total amount due of \$199,691.15 for the period September 1, 1979 through April 15, 1981.

On the same date, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Herbert Taylor, as officer of Mar Jear, in the amount of \$115,203.36, plus penalty and interest, for a total amount due of \$189,711.46 for the identical audit period.

On May 2, 1983, Herbert Taylor, as president of Mar Jear, executed a consent whereby it was agreed that sales and use taxes due from Mar Jear for the period September 1, 1979 through August 31, 1980 could be assessed at any time on or before December 20, 1983.

Prior to the audit period, the premises at 128 West 45th Street were leased by Herbert Taylor's stepfather, Abraham Gladstein. Mar Jear was incorporated for the sole purpose of operating a bar at this location. Abraham Gladstein was the sole shareholder of the corporation. Sometime prior to July 1979, Bernard Kurtz approached Herbert Taylor (who, at the time, was employed elsewhere) and asked him to help run the bar because Mr. Gladstein wanted to retire. As an inducement, Kurtz promised to pay Herbert Taylor's stepfather while in retirement if Taylor would act as a host at the bar. Taylor had previously known Bernard Kurtz and Benjamin Cohen who, along with Matthew Ianniello, apparently controlled Kurtz.

In or about July 1979, Herbert Taylor went to work at the bar which, at that time, was known as the Barnum Room. The Barnum Room was a gay disco which featured a cabaret show. Herbert Taylor was made an officer of Mar Jear and, as a condition of his employment, was instructed by Bernard Kurtz, Benjamin Cohen and Matthew Ianniello to hold himself out as the owner of the bar. Kurtz, Cohen and Ianniello were not officers of Mar Jear. Herbert Taylor is not certain whether or not there were other corporate officers nor does he know whether or not he was made a director of Mar Jear. He received a weekly salary from Mar Jear. While ostensibly the president, he had no authority to hire or fire employees.

In or about November 1980, the Barnum Room became a rock-and-roll club known as the Peppermint Lounge. As was the case previously, Bernard Kurtz ran the operation under the direction and control of Benjamin Cohen and Matthew Ianniello. Kurtz brought in his niece's husband, Frank Rocchio, to book rock groups and also hired a club manager, Mario Mannino, who, along with Rocchio, oversaw the day-to-day operation of the club. The Peppermint Lounge existed at the West 45th Street location until April or May 1982 when it moved to 100 Fifth Avenue at 15th Street and became known as the New Peppermint Lounge. The New Peppermint Lounge was operated by a different corporation.

The auditor requested Mar Jear's books and records for the period September 1, 1979 through August 31, 1982. He was informed by Mar Jear's accountant, Sol Goldman, that most of the records were unavailable due to the fact that they were stored at the West 45th Street location which had been closed after Mar Jear's bankruptcy in May 1982 (a Chapter 11 petition was filed in the U.S. Bankruptcy Court for the Southern District of New York on April 15, 1981 and was converted into a Chapter 7 liquidation proceeding on May 7, 1982). As a result, the only records made available were a cash receipts book, sales tax returns, Federal income tax returns and a few invoices. No cash register tapes, admission stubs, purchase invoices, general ledger or cash disbursements book were provided.

Mar Jear's accountant stated that the corporation was doing business only as a bar and that there was no income from admission charges or from the sale of food. When asked by the

auditor if Mar Jear had operated a disco, the accountant replied that it had been a disco for a short time only, no admission was charged and the musical entertainment was provided through the use of tapes.

The auditor thereupon visited the offices of the Village Voice, a weekly publication, to ascertain whether Mar Jear had placed advertisements therein. For the year 1981 and the first four months of 1982, he found weekly ads in the Village Voice which indicated that shows were regularly held, some featuring hit groups, and that admission fees were charged which varied with the day of the week and the group performing at the time. The auditor's group chief obtained the Certificate of Occupancy for the location which revealed that its capacity (two floors) was 540 people. A decision was made to assess tax on the admission charges at full capacity for Fridays, Saturdays and Sundays and one-half capacity for the remaining days of the week. Because the Village Voice ads indicated that admission charges ranged from 1¢ to \$10.00 (usually in the \$5.00 to \$10.00 range), the auditor chose an average admission charge of \$5.00. Weekly admissions were, therefore, determined to be in the amount of \$13,530.00 ( $542 \times 3 \text{ days} = 1626 \times \$5.00 = \$8,130.00$ ;  $270 \times 4 \text{ days} = 1080 \times \$5.00 = \$5,400.00$ ;  $\$8,130.00 + \$5,400.00 = \$13,530.00$ ), \$703,560.00 annually and \$175,890.00 quarterly. Tax assessed at the appropriate rate (8 percent) resulted in an assessment of \$14,071.20 per quarter on admission charges of \$91,462.80 for the audit period.

The auditor examined all of the expense purchase invoices made available to him (these invoices totalled \$1,851.78). Of this amount, he determined that sales tax should have been paid on invoices of \$729.05. A margin of error of 39.4 percent was, therefore, calculated and this margin of error was applied to maintenance charges, equipment and supplies set forth on Mar Jear's Federal income tax returns for the years at issue resulting in an assessment of tax on such purchases in the amount of \$6,152.08. It should be noted that no credit for tax reported and/or paid was given to Mar Jear for those portions of the total assessment relating to admission charges and expense purchases since Mar Jear, admittedly, reported, for sales tax purposes, only its bar sales.

With respect to such bar sales, the auditor took Mar Jear's purchases (from its Federal income tax returns) for the period September 1, 1979 through May 31, 1982 which, apparently, was the original audit period at issue. A markup percentage of 400 percent was applied to determine total sales. This percentage was agreed to by Mar Jear's accountant since it was the same markup percentage utilized in a previous audit.

It must be noted that the amounts of the assessments on admission charges and expense purchases referred to in Findings of Fact "4" and "5", supra, are not the amounts set forth in the audit report, but are, instead, the auditor's total calculations for the period September 1, 1979 through May 31, 1982 minus the final four quarters (June 1, 1981 through May 31, 1982) which are not at issue herein. One-half of the final quarter's (ended May 31, 1981) assessment has also been subtracted since the period at issue herein ends on April 15, 1981). For the assessment on bar sales, however, the utilization of a margin of error based upon purchases and reported sales for the period September 1, 1979 through May 31, 1982 does not result in an accurate assessment and must, therefore, be modified accordingly. Such modifications are as follows:

<u>Audit Report</u> (9/1/79 - 5/31/82)		<u>Audit Period</u> (9/1/79 - 4/15/81)	
Purchases \$	244,490.00	\$ 152,703.00	
Markup %	x 4.00	x 4.00	
	\$ 977,960.00	610,812.00	
Cost	+ 244,490.00	+ 152,703.00	
	1,222,450.00	763,515.00	
Taxable sales reported	-910,250.00	- 608,782.00	
	312,200.00	154,733.00	
Margin of error	$\frac{312,200.00}{910,250.00} = 34.3\%$	$\frac{154,733.00}{608,782.00} = 25.4\%$	

It is this revised margin of error (25.4 percent) rather than the auditor's margin of error which should be utilized to determine additional tax due on bar sales. Applying a 25.4 percent margin of error to reported taxable sales of \$563,646.00 (taxable sales reported for each of the first six quarters at issue plus one-half of the taxable sales reported for the quarter ended 5/31/81 since the audit period includes just one-half of this quarter) results in additional tax due on bar sales in the amount of \$11,453.29 (\$563,646.00 x .254 = \$143,166.08 x .08 = \$11,453.29).

As a result of the adjustments made in Findings of Fact "4" through "6", supra, the assessment against Mar Jear is reduced from \$121,354.76 to \$109,068.17 and the assessment against Herbert Taylor, as officer of Mar Jear, is reduced from \$115,203.36 to \$102,916.09 (tax on expense purchases was not assessed against Herbert Taylor).

As indicated in Finding of Fact "3", supra, petitioner Herbert Taylor was the president of Mar Jear. He had sole check signing authority and signed Mar Jear's tax returns. As a condition of his employment, he was to and did, in fact, hold himself out as the owner of the establishments operated by Mar Jear.

Matthew Ianniello, Benjamin Cohen and Bernard Kurtz were indicted and subsequently convicted of various acts of racketeering including, among other things, controlling various clubs and restaurants in New York City (including those owned by Mar Jear), failing to reveal their interests to the State Liquor Authority and "skimming" the gross receipts from these businesses. The above-named individuals along with Sol Goldman, Mar Jear's accountant, were also indicted for evading and defeating a large portion of the sales tax on the gross sales of Mar Jear which was due and owing to the Department of Taxation and Finance and for filing false and fraudulent sales tax returns in furtherance thereof.

During the trial in the United States District Court for the Southern District of New York, Nancie Martin, an assistant to Frank Rocchio at the Peppermint Lounge testified that, while he was the owner of record, Herbert Taylor had no specific responsibilities at this club.

After conviction on various counts of a 67-count indictment, the defendants appealed their convictions to the United States Court of Appeals for the Second Circuit (the convictions were affirmed). In his brief filed on behalf of the United States of America, United States Attorney for the Southern District of New York, Rudolph W. Giuliani, stated that while ostensibly owned by Herbert Taylor, the Peppermint Lounge was managed by Bernard Kurtz and controlled by Matthew Ianniello and Benjamin Cohen who skimmed cash from its receipts. The brief stated that Bernard Kurtz made the major management decisions, particularly regarding money and expenses and further stated that, while Herbert Taylor was the record

owner of the bar, he had no discernible responsibilities.

Petitioner, Herbert Taylor, was not indicted by the Grand Jury, but, instead, was granted immunity in return for his testimony before said Grand Jury.

Petitioners presented the Village Voice advertisements of the Peppermint Lounge which indicate that, for approximately the first six months of its operation, the Peppermint Lounge was only open from Wednesday through Sunday each week. Therefore, for the months of November 1980 through April 1981, the auditor's calculations for tax due on admission charges must be revised accordingly. Weekly admissions determined to be \$13,530.00 (see, Finding of Fact "4") for full-week operation must, for this period, be adjusted as follows:

Full capacity (542) x 3 days = 1626 x \$5.00 admission =	\$ 8,130.00
One-half capacity (270) x 2 days = 540 x \$5.00 admission =	<u>2,700.00</u>
	\$10,830.00

November 1980 - April 1981 (25 weeks) x \$10,830.00 = \$270,750.00  
Tax rate (8 percent) x \$270,750.00 = \$21,660.00 tax due

25 weeks x \$13,530.00 = \$338,250.00  
Tax rate (8 percent) x \$338,250.00 = \$27,060.00

\$27,060.00 - \$21,660.00 = \$5,400.00 adjustment

The assessments against petitioners, previously reduced in accordance with Finding of Fact "7", are further reduced by \$5,400.00. Accordingly, the assessment against petitioner Mar Jear is reduced to \$115,954.76 and the assessment against petitioner Herbert Taylor is reduced to \$97,516.09.

### CONCLUSIONS OF LAW

A. Tax Law § 1105(d)(i) imposes a sales tax on:

"[t]he receipts from every sale of beer, wine or other alcoholic beverages or any other drink of any nature, or from every sale of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers, including in the amount of such receipts any cover, minimum, entertainment or other charge made to patrons or customers (except those receipts taxed pursuant to subdivision (f) of this section)."

The vendor is required to collect this tax on behalf of the State and the burden of proof is on such vendor to show that a particular charge is not taxable (Tax Law § 1132[a]). In addition, Tax Law § 1135(a) requires each vendor to keep records of every sale or charge and of all

amounts paid, due or charged on such sale.

B. In conducting an audit of a taxpayer's records, the Division of Taxation must first request and thoroughly examine such taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806; Matter of King Crab Restaurant v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978). The purpose of such examination is to determine whether the records are so inadequate as to make it virtually impossible for the Division to verify taxable sales receipts and to conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). The Division may not ignore the taxpayer's records if these records provide an adequate basis upon which to determine the amount of tax due (Matter of Chartair, Inc. v. State Tax Commn., supra). The Division is not, however, required to rely upon a taxpayer's non-source documentation to determine the amount of tax due based upon documents which cannot be verified (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, lv denied 44 NY2d 645; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989).

In the present matter, the auditor requested Mar Jear's books and records for the period at issue, but complete records were not provided (see, Finding of Fact "4"). Moreover, Mar Jear's accountant informed the auditor that admission fees were not charged and that receipts consisted solely of bar sales. In the absence of adequate books and records, the Division is authorized to determine the amount of tax due on the basis of the information available and may resort to external indices if necessary (Tax Law § 1138[a][1]; see Matter of Carmine Restaurant v. State Tax Commn., 99 AD2d 581, 471 NYS2d 402). Considerable latitude is given to the auditor where the taxpayer's records are inadequate; it is only necessary for the Division to select an audit method reasonably calculated to reflect the tax due and it is then incumbent upon the taxpayer to establish that the result of the method utilized is unreasonably inaccurate or that the amount of tax assessed is erroneous (Matter of Meskouris Bros. v. Chu, 139 AD2d 813). Other than those adjustments set forth in Findings of Fact "6", "7" and "9", supra, petitioners have produced no evidence which would indicate that either the audit methods employed or the



result obtained from the utilization of such methods were erroneous. Therefore, with the exception of the modifications as set forth in such Findings of Fact, petitioners have wholly failed to show entitlement to any additional modifications. Accordingly, the assessment against petitioner Mar Jear, after the appropriate reductions as set forth in Findings of Fact "6", "7" and "9" have been made, is sustained. With respect to petitioner Herbert Taylor, such Findings of Fact have also modified the assessment against him. However, in order to sustain such revised assessment against this petitioner, the issue as to whether or not he was a person required to collect sales and use taxes on behalf of Mar Jear must first be considered.

C. Tax Law § 1133(a) provides, in part, that every person required to collect the taxes imposed under Article 28 of the Tax Law is also personally liable for the tax imposed, collected or required to be collected under such law.

Tax Law § 1131(1), in effect for the period at issue, defined "persons required to collect tax", as used in Tax Law § 1133(a), to include any officer or employee of a corporation, or a dissolved corporation who, as such officer or employee, is under a duty to act for the corporation in complying with any requirement of Article 28 of the Tax Law.

D. The holding of corporate office does not per se impose tax liability upon the office holder (Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536). The determination that an individual is a person required to collect tax depends upon the particular facts of each case (Matter of Autex Corporation, Tax Appeals Tribunal, November 23, 1988). The relevant factors to be considered when determining whether a person has the duty to act on behalf of the corporation include, inter alia, authorization to sign corporate tax returns, responsibility for management or maintenance of the corporate books, authority to hire and fire employees and derivation of substantial income from the corporation or from ownership of corporate stock (see, 20 NYCRR 526.11[b][2]; Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Matter of Blodnick v. State Tax Commn., supra; Matter of William D. Barton, Tax Appeals Tribunal, December 28, 1989).

Other indicia include whether the individual had simultaneous status as an officer,

director or shareholder (Matter of Cohen v. State Tax Commn., supra) and authority to issue checks on behalf of the corporation (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427), and the individual's knowledge of and control over the financial affairs of the corporation (Vogel v. New York State Dept. of Taxation and Finance, 98 Misc 2d 222, 413 NYS2d 862; see also Matter of William D. Barton, supra; Matter of Autex Corporation, supra).

E. While petitioner Herbert Taylor was the record owner of the establishments operated by Mar Jear and held himself out as such, this was done as a condition of his employment and as a means of concealing the true owners and operators of such establishments, to wit, Bernard Kurtz, Benjamin Cohen and Matthew Ianniello. These individuals did not allow their names to appear on corporate books and records, i.e., corporate books and shares, tax returns, checks and licenses. Although it is true that Herbert Taylor held corporate office, signed corporate checks and returns and applied for appropriate licenses, all of his actions were done under the supervision and control of Messrs. Kurtz, Cohen and Ianniello who were indicted and convicted of offenses relating to activities performed in connection with this and other clubs and restaurants in New York City (see, Finding of Fact "8"). It is clear, therefore, that petitioner Herbert Taylor did not have the requisite responsibility for management decisions nor did he have control over the financial affairs of Mar Jear so as to conclude that he had the duty to act on behalf of Mar Jear in complying with the requirements of Article 28 of the Tax Law.

F. The petition of Mar Jear Restaurant, Inc. is granted to the extent indicated in Conclusion of Law "B"; the Division of Taxation is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to such petitioner on October 4, 1983 accordingly; and, except as so granted, the petition is in all other respects denied.

G. The petition of Herbert Taylor, officer of Mar Jear Restaurant, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to such petitioner on October 4, 1983 is cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE